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No. 319

IN THE

Supreme Court of the United States

ALEX STEINBERG, *Petitioner*

VERSUS

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR CERTIORARI AND SUPPORTING BRIEF

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ALEX STEINBERG, *Petitioner*

VERSUS

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, The Supreme Court of the United States:

Comes now ALEX STEINBERG, hereinafter styled petitioner, and, applying for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

STATEMENT OF THE CASE

An indictment was filed on the 14th day of May, 1946, against Alex Steinberg in the United States District Court

for the Northern District of Texas, Dallas Division, containing four counts. (Tr. pp. 2-8)

The first count charges that petitioner on May 15, 1944, attempted to defeat and evade a large part of his income and Victory tax due to the United States for 1943 by filing a false and fraudulent income and Victory tax return, wherein he stated that his income and Victory tax due and owing for 1943 was $24,086.21, when he owed a tax in the amount of $434,904.53.

The second count charges that petitioner attempted to defeat and evade a large part of the income and Victory tax due by his wife, Mary C. Steinberg, for the year 1943, in that he filed a false and fraudulent income and Victory tax return wherein she stated that the amount of income and Victory tax due and owing for 1943 was $24,386.21, when he knew that her tax was $435,204.53.

The third count charges that petitioner filed for himself for 1943 an income tax return which he did not believe to be true and correct, in that it contained the false statements set out in the first count.

The fourth count charges that petitioner filed for his wife for 1943 an income tax return which he did not believe to be true and correct, in that it contained the false statements set out in the second count.

The government developed its case by the introduction of a number of witnesses from different parts of the

United States, who testified as to having purchased during 1943 barrel and case whiskey from or through Alex Steinberg, the petitioner, and as to having paid amounts in excess of the ceiling price for the whiskey. The transactions were supported by the testimony of the respective witnesses and their records. The government contended that the profit, including over-the-ceiling prices, on the transactions was $985,230.26, and that petitioner made a return showing that he and his wife jointly had received during 1943 from this source $93,658.30. The government claimed an unreported income during 1943 to petitioner and his wife of $891,571.96.

There was no substantial difference between the government and the petitioner as to the amounts of money involved or the kind and character of the transactions between the purchasers of whiskey and Steinberg. The crucial difference was that the government claimed that Steinberg was a principal in most of the transactions and received and retained all or substantially all of the $985,-230.26, while Steinberg contended and testified that he was merely a broker or agent in the transactions and was entitled to and retained only $93,658.30, which he reported in his tax returns and paid taxes on; that Robert Gould or distilleries owned or controlled by Gould were the principals in most of the transactions, and that he, Steinberg, paid in 1943 in cash to Gould all of the remainder, which was $891,571.96.

Steinberg testified that he had been a liquor broker since the repeal of prohibition in 1933, and that in 1943 after the OPA put a ceiling price on whiskey, it was hard for him to find whiskey for his customers; that he knew Robert Gould owned or had a controlling interest in distilleries; that he contacted Gould to find a supply of whiskey; that Gould said he had a supply but that he would not sell any whiskey at OPA ceiling prices. Steinberg testified he told Gould he was not interested in the price, that he wanted to find a supply and if his customers were willing to pay the price, that was their business; that all he, Steinberg, wanted was his brokerage or commission if the customer bought the whiskey. (Tr. 1294-5) That Gould said the over-ceiling money would have to be paid to him, Gould, in cash in his office in Cincinnati, and that no checks would be accepted and no receipts would be given. (Tr. 1295) Steinberg testified that he would advise his customers of Gould's prices for whiskey and if the customer was willing to pay the price, Steinberg would close the deal with Gould and pay Gould the over-ceiling money in cash; that some times he took the currency to Gould, some times he sent currency by express, some times by registered letter. (Tr. 1015) Steinberg testified as to the dates and the amounts of the payments he made to Gould, and that every transaction was a distinct transaction, and the commission or brokerage was figured and the balance of the over-ceiling money was paid to Gould in cash. (Tr. 1336) That the customer would pay Stein-

berg the amount of the over-ceiling money (Tr. 1296, Tr. 1433) and usually the distillery would ship the whiskey to the customer with bill of lading attached to draft for the amount of the ceiling price.

Neither Gould's books nor the distilleries' books showed the over-ceiling prices which the customers paid. (Tr. 564; Tr. 1003) Steinberg had neither checks to Gould nor receipts from Gould for the moneys paid to Gould. (Tr. 813)

Steinberg testified that in 1944 after Gould got into trouble with OPA, Gould called him to New York and asked Steinberg how much over-ceiling or black market money he had paid to Gould in 1943. Steinberg answered upward of three-quarters of a million dollars, nearer nine hundred thousand dollars; that Gould said he did not think it was that much. Steinberg testified that Gould then paid to him approximately $300,000.00 in currency and told Steinberg to report it and pay taxes on it. (Tr. 1370-1375) That Ferdinand Tannenbaum, Gould's tax attorney, told Steinberg that he could in 1944 report this as "finder's fees" on 1943 whiskey transactions. (Tr. 1223) Steinberg took the currency, reported it as 1944 income to him and paid taxes on it. (Tr. 1378)

Robert Gould and Dowling Bros. Distilling Company, controlled by Robert Gould, were indicted in January, 1945, at Covington, Kentucky, and charged in forty-eight counts of an indictment with violations in 1943 of the

OPA regulations fixing the maximum prices for the sale of whiskey. They were convicted and Gould was sentenced to six consecutive years in jail and a fine of $240,000.00, and the Distilling Company was fined $240,000.00. The case was appealed and affirmed, and petition for certiorari was applied for and pending during the time of Steinberg's trial at Dallas, Texas.

Counsel for petitioner (Tr. 967) stated to the trial court that the testimony of Robert Gould was of vital importance; that the government did not call him as a witness and that petitioner did not want to sponsor the witness, and asked the court to call Robert Gould as a witness. The court declined to call Robert Gould as a witness. Counsel for petitioner called Robert Gould. Gould declined to testify on the ground that his answers might tend to incriminate him. The witness stated that he had testified in his own behalf when he was tried for the OPA violations, but this conviction was on appeal and that some of the questions would directly incriminate him and might be used against him in another trial. The court required the witness to answer and testify. (Tr. 982)

Gould was asked whether or not he had been paid in 1943 in excess of one and a half million dollars by Alex Josselson, Edward J. Baumer, Ronald Munson, Harry J. Rothman and Michael J. Friedman over and above the ceiling prices for whiskey sold them. The court declined to permit the testimony. (Tr. 985-988)

Gould denied (Tr. 988) that Alex Steinberg had paid him $846,275.25 in cash during 1943. He then denied having received cash payments from Steinberg on specific dates, in currency or by express or registered letter. (Tr. 989-991)

Gould denied having paid on November 21, 1944, to Steinberg in New York approximately $300,000.00 in currency. (Tr. 988)

The Circuit Court of Appeals correctly said on page 4 of its opinion—"The crucial questions for the jury were the credibility as a witness of Steinberg, and of Gould, who was offered as a witness by the defense, but who testified as he had in his own trial, that Steinberg had never paid him any excess sales money, nor had he delivered or paid to Steinberg $352,000.00 in November, 1944; etc"

At the trial Steinberg offered as witnesses in his behalf, Alex Josselson, Edward J. Baumer, Ronald Munson, Harry J. Rothman and Michael J. Friedman, to testify as to the nature of their whiskey transactions with Gould in 1943, to show that each of them had substantially the same transactions with Gould that Steinberg had, that is, that Gould demanded over-ceiling prices for the whiskey bought from him or his distilleries and required such over-ceiling prices to be paid to him in person in cash, and that no receipts were given. The trial court refused to permit these witnesses to testify.

Ferdinand Tannenbaum, an attorney of New York, employed by Gould as a tax attorney, was offered by Steinberg as a witness at his trial, and while he was on the stand the attorney for Steinberg stated to the court that Steinberg contended and would testify that he paid all of the over-ceiling prices or hot money in whiskey transactions to Gould, and that the petitioner proposed to show that in 1944, after Gould had gotten into trouble with the OPA, Gould paid back to Steinberg approximately $300,000.00 of over-ceiling money that Steinberg had paid to him in 1943, and that Tannenbaum, Gould's tax attorney, advised Steinberg that he could in 1944, after limitation had run and the title to the money was no longer in question, accept the money and report it and pay taxes on it in 1944. The trial court refused to permit this testimony. (Tr. 1228)

The United States Attorney and his assistant, during their arguments to the jury, made many inflammatory and prejudicial remarks about petitioner admitting while on the witness stand that he was a Black Market operator in whiskey transactions during war times, making a million dollars, and that he cynically admitted while on the witness stand that he had daily for more than a year violated the federal laws; and the attorney compared Steinberg to Shylock. The Circuit Court of Appeals said: "The speeches are reported in full and appear to us

to be logical and not inflammatory, and not exceeding in vigor what the nature of the case authorized".

The trial judge, in the presence of the jury, voiced expressions and made intimations which were departures from disinterestedness, were prejudicial and unfair and in themselves, cumulative as they were, prevented a fair trial to the petitioner. The Circuit Court of Appeals said in paragraph 4 of its opinion: "The report of the trial shows the judge ruling for one side about as often as the other. We are not impressed that there was any general hostility to the defendant or his counsel".

Steinberg was convicted on the 24th day of September, 1946, was sentenced on the 27th day of September, 1946, to serve eight years in the penitentiary and to pay a fine of $24,000.00 and to pay the costs of prosecution.

STATEMENT AS TO JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended, (28 U.S.C.A., Section 347-a). The opinion of the Circuit Court of Appeals was filed on June 12, 1947. Petition for rehearing was filed in the Circuit Court of Appeals on July 1, 1947, and overruled on August 11, 1947.

QUESTIONS PRESENTED

Only a few of the specified errors were considered by the appellate court, and we urge that the Circuit Court of Appeals erred in the following particulars:

1.

The trial court erred in refusing (Tr. 1032-1078) to permit the testimony of six or eight witnesses present at the trial, offered by Steinberg as bearing directly upon his defense and to corroborate his testimony and to impeach the testimony of Robert Gould on the crucial issue in the case as to who ultimately received the over-ceiling money in the whiskey transactions, and to explain and clarify other evidence, especially as to why Steinberg had no record evidence of any payments of money to Gould. The Circuit Court of Appeals erred in affirming the action of the trial court in refusing to permit this testimony.

2.

The trial court erred in refusing to permit the introduction of the testimony of Ferdinand Tannenbaum, an attorney for Gould, offered by the petitioner as bearing directly upon his defense and to corroborate his testimony upon the crucial issue as to whether or not he had paid to Gould over-ceiling money in whiskey transactions in 1943. Steinberg testified he had paid the money, and Gould denied it. The Circuit Court of Appeals erred in affirming the action of the trial court in refusing to permit this testimony.

3.

The trial court erred in permitting the Assistant United States Attorney in his argument to the jury to state that

Steinberg testified under oath that constantly for nearly a year he engaged in the largest Black Market operations of which the jury probably ever heard, making nearly a million dollars, etc. Upon objection that Steinberg did not so testify, the trial court ruled this was a deduction of counsel and the jury could weigh it. No contention was made that the prosecuting attorney had correctly stated the testimony of the petitioner. The Circuit Court of Appeals erred in affirming the ruling of the trial court and in stating in its opinion that the statement of the prosecuting attorney was an exaggeration but perhaps an allowable inference.

4.

The United States Attorney and his assistant, in their arguments to the jury, made many inflammatory and prejudicial remarks about the petitioner and his testimony and defense or lack of defense, they stated he framed his defense, they injected the racial question into the case and compared petitioner to Shylock, etc. The Circuit Court of Appeals said that the criticisms were not supported by objection in the trial court and—"The speeches are reported in full and appear to us to be logical, and not inflammatory, and not exceeding in vigor what the nature of the case authorized". Such holding fixes no standard to control the argument of a prosecuting attorney; he may, in common parlance, go the limit and wager that he can exercise such skill that a reviewing court will not

say the argument is without the limits of the boundaries here laid down.

5.

Objections were made to the expressions and intimations of the trial judge in the presence of the jury during the trial, one of which is referred to in paragraph 4 of the opinion of the Circuit Court, where Mr. Meacham, attorney for Steinberg, asked the witness, Julius Schepps, if he knew the reputation of Steinberg as being a large contributor to charity. This was objected to. The trial judge remarked: "I think in a certain book, Gone With the Wind, one of the most charitable persons in there was of bad reputation otherwise". The Circuit Court of Appeals stated: "The remark was out of place, but we think it was cured by its withdrawal". If the trial judge makes statements out of place, it should affirmatively appear that no prejudice resulted to the defendant.

6.

Other rulings, expressions and intimations of the trial judge were presented to the Circuit Court of Appeals as being improper and prejudicial. The Circuit Court of Appeals said: "The report of the trial shows the judge ruling for one side about as often as the other. We are not impressed that there was any general hostility to the defendant or his counsel". The test of the justness or fairness of the trial judge's ruling should not be that

numerically they are fifty-fifty or "about" that numeral; neither should it be that no *general* hostility is shown.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The opinion of the Fifth Circuit Court of Appeals in this case is in direct conflict with the opinion of this Court in *Home Insurance Co. vs. Weide et al*, 11 Wall. 438, 20 L. Ed. 197; and the opinion of this Court in *Holmes et al vs. Goldsmith & Co.*, 147 U. S. 150, 37 L. Ed. 118. The opinion is in conflict with the opinion of another Circuit Court of Appeals—*Chitwood vs. U. S.*, (CCA 8th), 153 F. 551.

The Fifth Circuit Court of Appeals has, in its opinion in this case, decided federal questions in a way probably in conflict with applicable decisions of this Court; and has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

No. 1.

The government proved its case by introducing a large number of wholesale whiskey dealers who testified as to their purchase of whiskey from or through Steinberg and as to the payments made to Steinberg, which included over-ceiling or Black Market payments.

There was no substantial difference between the government and Steinberg as to these transactions or the amounts of money involved. The government left its case with the showing that Steinberg had received $985,230.26 in the profits from whiskey transactions. That Steinberg reported from this source and paid taxes on $93,658.30. That the unreported income was $891,571.96. Steinberg contended and testified that he paid this $891,571.96 in cash to Gould, according to the demands of Gould in their whiskey transactions.

Steinberg called Robert Gould as one of his witnesses and proved that Gould and Dowling Bros. Distilling Company were indicted for charging over-ceiling prices on liquor transactions during 1943, and that they were convicted and Gould was sentenced to six one-year sentences to run consecutively and fined $240,000.00 and the Company was fined $240,000.00. (Tr. 996, 997)

Gould was asked whether or not Steinberg had paid to him, Gould, in person or sent to him by registered mail or express different sums of money in 1943, approximately $891,000.00, all of which he denied. Gould was asked whether or not during 1943 he had sold whiskey to Alex Josselson, Edward J. Baumer, Ronald Munson, Harry J. Rothman and Michael J. Friedman, and if they paid him in cash in excess of a million and a half dollars over and above ceiling price of whiskey. This was objected to. (Tr.

985, 986) Mr. Meacham, attorney for Steinberg, stated to the court: (Tr. 986)

> "The only issue in the case now on trial, that is whether or not this defendant paid to this man on the witness stand, Robert Gould, the money which the goverment asserts as income to him in the trial of this case. I submit we are entitled to show this witness' method of doing business. What he required of his customers, as corroborative of the testimony which will come from the defendant himself."

The objection to the testimony was pressed by the government. The court sustained the objection, stating: "It is irrelevant and not connected with this trial." (Tr. 987)

Steinberg offered Alex Josselson as a witness (Tr. 1031) and after he testified that he had whiskey transactions with Robert Gould in 1943, he was asked whether or not he paid Gould over three hundred thousand dollars in cash over-the-ceiling price for whiskey. This was objected to by the government. Counsel for Steinberg stated that the purpose was to show that in the Gould whiskey transactions there were substantial sums of money which were for over-ceiling prices for whiskey and were paid to Gould in cash and for which Gould gave no receipts, and this testimony was offered to show that others who had whiskey transactions with Gould had identically the same transactions that Steinberg had; that it was admissible to show the scheme, practice and the general manner in which Gould ran his distillery and brokerage business. (Tr. 1033)

That the government based its case on the proposition that Steinberg had no receipts to show the payment of any money to Gould, and if Steinberg is deprived of this testimony, there is no way that he can meet the government's contention that Steinberg retained the money. That Steinberg should be permitted to show the practice, scheme and system carried on by Gould and to explain why Steinberg had no receipts. The court sustained the objection and declined to permit the testimony.

Mr. Meacham, attorney for Steinberg, at Tr. 1036, stated for the purpose of the exception that Steinberg desired to show that every one who bought whiskey from Gould during 1943 paid over-ceiling prices in cash to Gould and never got a receipt; and that petitioner had six or eight witnesses in attendance on the trial who would testify as to their similar experiences with Gould. The court declined to permit the testimony.

It was called to the court's attention, at Tr. 1032, that the government had offered the witness, Edward J. Baumer, in the early part of the trial, who had testified, at Tr. 398, that he had some whiskey transactions with Robert Gould in 1943 and that between June 30 and December 20, 1943, he paid to Gould a total of $230,388.50 in cash over-ceiling prices for whiskey; that Gould demanded over-ceiling prices for whiskey and required Baumer to collect over-ceiling prices; that Baumer would then call Gould and Gould would let him know what time he would

be in his office, so that Baumer might come to Cincinnati and pay Gould the money in cash. The court, being advised of this testimony and that defendant desired to introduce other witnesses in the same connection, struck out the former testimony of Baumer. (Tr. 1037)

The witness, Ronald Munson, was offered by petitioner, at Tr. 1038, to testify as to substantially the same facts with reference to his transactions with Robert Gould during 1943, except as to amounts and dates of the transactions; and the court did not permit this testimony.

The witness, George Theunker, was offered as a witness for defendant, at Tr. 1043, to testify as to his conversation with Robert Gould relative to his collection of illegal overcharges or premiums for whiskey, and as to Gould's suggestion that the witness file an amended tax return, showing the overcharges as his, the witness' income, and that Gould would pay the expense in that connection. It was stated that Steinberg would testify that Gould had substantially the same conversation with him. The court declined to permit the testimony. (Tr. 1044)

Steinberg offered the witness, Michael J. Friedman, at Tr. 1075, and asked him about his transactions in Black Market whiskey in 1943 with Robert Gould. This was objected to. The attorney for Steinberg stated, at Tr. 1077, that he would like to suggest an analogy:

> "Assume that I have an office in an office building that has a grouchy old landlord, a very peculiar man,

> he won't take my check, and insists that he won't give any receipt, and Mr. Tallichet comes around and examines my income tax return and he says, 'I am not going to give you that office rent as a necessary business expense because you cannot produce a receipt.' Would Your Honor say it would be unreasonable for me to bring in the rest of the tenants in the building to show the practice of that particular landlord, that he won't give receipts, and he won't take anybody's check, and, accordingly, I cannot produce the receipts. That is the purpose of this testimony."

The court stated, at Tr. 1078, "I don't think the rules of evidence go that far." The trial court did not permit the testimony.

It was stipulated that the witness, Michael J. Friedman, would have testified that in 1943 he purchased a quantity of whiskey form Robert Gould or his company, that he paid the invoice price of the whiskey and, in addition, paid Gould an overage of $1,344,852.49 above the ceiling price; that the money was paid to Gould in cash at his office in Cincinnati.

It was stipulated that the witness, Rothman, was another of the witnesses who would testify as to over-ceiling moneys paid in cash to Gould. (Tr. 1067)

After refusing to permit this testimony, the court permitted the prosecuting attorney to argue that Steinberg's defense could not be believed because he had no records to support it.

The Circuit Court of Appeals held at paragraph 6 of its opinion:

> "The evidence offered did not go to the extent that Gould had a rule or uniform practice of business, but only that he required cash of those customers. There may have been others who were dealt with otherwise. An endless inquiry might be opened up. For the purpose for which it was offered, we think the evidence not relevant."

We think the evidence was admissible and that the jury was entitled to pass upon the weight of the evidence.

No. 2

While the witness, Tannenbaum, was on the stand, at Tr. 1220, 1226, the attorney for Steinberg stated to the court that he wanted to ask the witness, Tannenbaum, whether or not he was present in New York in 1944 when Steinberg in the presence of Gould had a conversation relative to overage money which went through his hands in 1943, and whether or not he, Tannenbaum, Gould's attorney, told Steinberg that he could report the money in 1944 as a finder's fee on transactions in 1943, and pay taxes on it, and gave Steinberg a copy of a decision that substantiated his advice.

Petitioner's attorney further stated, at Tr. 1221, that Steinberg would testify to the transaction; that Gould had denied it; that Tannenbaum's testimony would corroborate Steinberg and impeach Gould, and would tend to show

that Steinberg had in 1943 paid over to Gould the moneys that he claimed that he did, and that in 1944 Gould paid it back to Steinberg, or a part of it.

The trial court misunderstood, in our opinion, the purpose of the testimony. The trial court seemed to think that petitioner was trying to prove that Tannenbaum's advice was good as a matter of law, that is, that a person could accept moneys in 1944 and pay taxes on it when the title became unquestioned, even though the money had come into his hands in 1943, because the trial court said at Tr. 1226:

> "I don't think a man is warranted in buttonholing a lawyer on the street, and getting a half-baked opinion and then claiming immunity because he got the wrong advice."

The trial court overruled the testimony. The Circuit Court of Appeals misunderstood the purpose of the testimony, because they said:

> "Whether over-ceiling money ought as a matter of law to be returned in the year it passed into the taxpayer's hands as his own, or whether because it might be reclaimed by the payor or the administrator, is to be considered like embezzled funds which are not gain at all, is a question of law and not of ex post facto advice. The court could have been called on to decide it, if important to this case. We find no error in ruling out the opinion of Gould's lawyer expressed in November, 1944." (Tr. p. 1702)

This testimony was admissible, as it corroborated Steinberg and impeached Gould's testimony and tended to explain evidence already in the record.

No. 3

Mr. Fonville, Assistant United States Attorney, in his argument to the jury, referring to Steinberg's testimony, stated at Tr. 1519:

> "He testified to you under oath that constantly for nearly a year, every day, he engaged in the largest black market operations of which you have probably ever heard, making nearly a million dollars, at a time when this nation was in a splendid effort to avoid the catastrophe of wild inflation, in a situation where demand far exceeded supply, and the price of whiskey was just a small part of the whole; here is a man who cynically, from this stand, tells you he has violated the federal law, every day, for nearly a year, and would have the temerity to introduce before you witnesses to say he has a reputation of being a law abiding citizen."

This was objected to and it was stated that Steinberg had not testified as counsel stated. The court said (Tr. 1520):

> "That is a deduction of counsel, we will just let the jury weigh it."

The Circuit Court of Appeals said in its opinion (Tr. p. 1695, 1696)

> "The statement that Steinberg violated the law every day was an exaggeration, but perhaps an allowable inference. The court did not err in his ruling that the matter was to be weighed by the jury."

Perhaps the prosecuting attorney's statement was not an allowable inference. The trial court should see to it that there is no misstatement of the evidence and that the jury is not misled as to what the evidence is.

The trial court should have instructed the jury that they should draw their own conclusions from the testimony, or should have instructed them as to what the testimony in question was. There is no rule that we know of that permits or perhaps permits the jury or any one else to draw inferences from a misstatement of the testimony of a witness. A fair trial requires that the judge see that the defendant is tried upon the relevant evidence and proper inferences drawn from the facts or evidence.

The prosecuting attorneys devoted most of their arguments to a castigation of petitioner's connection with Black Market transactions and stated at different times that the defendant "testified" that he entered into Black Market operations and "in a year, less than a year, he made nearly a million dollars" etc.; that he was greedy; that greed motivated his transactions; that all he wanted was money and lots of it; and compared petitioner to Shylock, one of the most famous characters of Shake-

speare; and other criticisms and objections were called to the attention of the Circuit Court of Appeals, and that Court said (Tr. 1696):

> "The speeches are reported in full and appear to be logical and not inflammatory, and not exceeding in vigor what the nature of the case authorized."

We contend that this is not and should not be the rule. There is no standard fixed and, if this was the standard, then proper or appropriate arguments would be made to depend upon the variant opinions of the reviewing courts as to whether or not the prosecuting attorney had exercised appropriate skill and not exceeded the vigor which the reviewing court thought the prosecution was entitled to exercise in view of the nature of the case.

No. 4

Complaint was lodged against the expressions and intimations of the trial judge which were claimed to be a departure from the impartiality and disinterestedness required of a judge in conducting a fair trial and manifested to the jury the judge's feeling that the petitioner's defense had no merit, and that he was guilty. The extreme sentence imposed on petitioner, a man over sixty years of age, tends, in our opinion, to show the judge's feeling. We believe our statements are supported by expressions in the opinion of the Circuit Court of Appeals. In referring to a particular remark of the trial judge, that Court said: (Tr. 1698)

> "The remark was out of place, but we think it was cured by its withdrawal. The ruling on the evidence offered was correct."

If there was any doubt, and it appears there was, it should affirmatively appear that no injury was done to the person being tried. It is not sufficient for the court to say that they think that prejudicial errors, mistakes or out of place remarks were cured. If they occur there is but one remedy under our form of government, and that is to give a new trial where out of place remarks do not take place.

The Circuit Court of Appeals further said at Tr. 1698:

> "Other things are brought forward as showing hostility by the judge. These rulings as such were not erroneous. The report of the trial shows the judge ruling for one side about as often as the other. We are not impressed that there was any general hostility to the defendant or his counsel."

The Circuit Court of Appeals does not pass upon the expressions and intimations of the trial judge that were complained of that accompanied the rulings of the court, but only refers to the correctness or not of the rulings. Fair trials should not be determined on a numerical basis, that is, that the court ruled for one side about as often as the other; neither should the judge be allowed to show even a little hostility to the person on trial. The opinion of the Circuit Court is susceptible of being misunder-

stood and misapplied, and is contrary to other opinions of the Supreme Court and of other Circuit Courts.

CONCLUSION

1. The opinion of the Circuit Court of Appeals does not announce the correct rule to determine the admissibility or relevancy of evidence which bears upon or relates to the main issue. The Circuit Court would exclude the evidence if it does not afford full proof of the existence or nonexistence of the disputed fact, and this is contrary to the holding of the Supreme Court and of other circuit courts.

2. The opinion of the Circuit Court of Appeals lays down no standard and fixes no rule to govern trial courts and trial attorneys as to the latitude to be allowed prosecuting attorneys in their speeches to the jury. The Circuit Court said that the arguments in this case were not prejudicial because they were logical and not inflammatory and not exceeding in vigor what the nature of the case authorized. This is vague, indefinite and uncertain and is equivalent to no standard or rule and leaves the standard or rule to be fixed according to the variant views of the different courts which may be called upon to pass upon the question.

3. The opinion of the Circuit Court of Appeals does not pass upon the objections and criticisms presented which complain of the expressions and intimations of the trial

judge made during the trial. The Circuit Court merely passes upon the correctness or not of the rulings made by the trial court and says that the trial judge ruled for one side about as often as the other, and they were not impressed that there was any general hostility to the defendant. This might be understood as allowing certain latitude to a trial judge in his expressions and intimations in the presence of the jury so long as they do not show a general hostility toward the defendant. This is contrary to the rulings of the Supreme Court and of other circuit courts and is so vague, indefinite and uncertain about such a serious matter as to call for review by the Supreme Court.

This opinion should not be permitted to rest where it is.

WHEREFORE, petitioner prays that the writ of certiorari issue; that the cause be reviewed by this Court, and that the judgment of the trial court and the Circuit Court of Appeals be reversed.

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SUPPORTING BRIEF

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No. ———

IN THE

Supreme Court of the United States

ALEX STEINBERG, *Petitioner*

VS.

UNITED STATES OF AMERICA, *Respondent*

SUPPORTING BRIEF

To the Honorable, the Supreme Court of the United States:

1.

The opinion of the Circuit Court of Appeals for the Fifth Circuit appears in the Transcript of the Record (Tr. p. 1691-1703).

JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code (28 U.S.C.A., Section 347-a). The original

opinion of the Circuit Court of Appeals was filed on June 12, 1947.

Petition for rehearing was filed on July 1, 1947, and overruled on August 11, 1947.

STATEMENT OF THE CASE

We adopt the statement made in the foregoing petition for certiorari as a part of the statement of the case and, to save repetition, do not restate it here. We will make such further statements as are appropriate in connection with the argument.

SPECIFICATION OF ERRORS

1.

The government showed that in 1943 large sums of money including over-ceiling prices in whiskey transactions were paid to Steinberg. The government contended that this was income to Steinberg and that he did not report and pay income tax on a large part of it. Steinberg contended and testified that he was only a broker in the transactions and retained only his brokerage or commissions, and that he passed the balance of the money, including the over-ceiling prices, on to Gould or distilleries owned or controlled by Gould. Gould, called as a witness for the defense, denied receiving the moneys. The Circuit Court of Appeals stated in its opinion that one of the

crucial questions for the jury was the credibility as witnesses of Steinberg and Gould. Steinberg offered six or eight witnesses who would have testified that they had whiskey transactions with Gould in 1943, wherein Gould demanded over-ceiling prices for the whiskey sold to them, required such moneys to be paid in cash in person to him, and gave no receipts. The Circuit Court of Appeals erred in affirming the action of the trial court in not permitting this testimony as directly bearing upon petitioner's defense and as corroborative of Steinberg and impeaching Gould and explaining why Steinberg gave no checks to and had no receipts from Gould.

2.

The Circuit Court of Appeals erred in affirming the action of the trial court wherein it refused to permit the testimony of Ferdinand Tannenbaum as to what was said at the meeting between Steinberg and Gould in New York in November, 1944, when Tannenbaum advised Steinberg there had been a recent decision by the Court of Claims on the question as to when a tax payer might report and pay taxes on moneys which came into his hands. The Circuit Court of Appeals misunderstood the purpose of the testimony. The court was not asked to pass on the legal question as to whether or not a person could legally pay taxes on moneys received at any other time than during the year in which he received them.

Steinberg testifed that in 1943 he paid all of the $891,-571.96 to Gould in cash, and that in 1944 when Gould got in trouble with OPA, Gould called Steinberg to New York, asked Steinberg how much money he had paid to him, Gould in 1943, and paid back to Steinberg approximately $300,000.00, and told Steinberg to make a tax return on it as his, Steinberg's income, and pay taxes on it. Gould denied this. The issue was who was telling the truth, Steinberg or Gould. Petitioner desired to corroborate his own testimony and impeach Gould by having Tannenbaum testify as to what happened and was said in his presence.

3.

The Circuit Court of Appeals erred in holding that, even though it was not contended that the statement of the prosecuting attorney in his argument as to what the petitioner testified to was a correct statement of the testimony, still it was perhaps an allowable inference which the jury could consider and weigh. There can be no proper inference that can be drawn from an admitted misstatement of testimony. A fair trial required and the court should see that a defendant is tried on the evidence or proper inferences from the evidence.

4.

The Circuit Court of Appeals erred in holding that the speeches of the prosecuting attorneys, which were re-

ported in full—"appear to be logical and not inflammatory and not exceeding in vigor what the nature of the case authorized".

5.

The trial court erred during the trial of the case in his expressions and intimations in the presence of the jury, which were prejudicial and unfair, were a departure from disinterestedness and in themselves, cumulative as they were, prevented a fair trial, and the Circuit Court of Appeals erred in holding that—"The report of the trial shows the judge ruling for one side about as often as the other. We are not impressed that there was any general hostility to the defendant or his counsel".

ARGUMENT

Steinberg in 1943 held a license to act as a broker or commission man in the sale of whiskey belonging to others. After April, 1943, there was a ceiling price on the sale of whiskey. Steinberg found it difficult to find a supply of whiskey for his customers. Steinberg testified that he asked Gould, whom he knew to be the owner of or in control of distilleries, whether or not Gould had a supply of whiskey. Steinberg testified that Gould told him that he had plenty of whiskey; that he would not sell it at ceiling prices; that he demanded over-ceiling prices; that such moneys had to be paid in cash to him in person and that

he would give no receipts. Steinberg testified that he told Gould he was not interested in the price; that if his customers wanted to pay the price, that was their business; that he was interested only in his brokerage or commissions. The government proved that a number of wholesale whiskey purchasers arranged with Steinberg to buy whiskey; that over-ceiling prices were paid; that the whiskey was shipped to the purchasers in most instances from distilleries owned by Gould. That Steinberg was paid $985,230.26 including over-ceiling money in these transactions. That Steinberg reported from this source as his income $93,658.30. That $891,571.96 was not reported by Steinberg. Steinberg testified that he paid this $891,-571.96 in cash to Gould and gave the day and amounts of the payments. He testified that in November, 1944, after Gould got into trouble with the OPA, Gould called him to New York and that Gould gave him approximately $300,-000.00 in currency and told him to report it and pay taxes on it. That Ferdinand Tannenbaum, a tax attorney employed by Gould, was present during a part of the time and told Steinberg that if a person received moneys in a certain year which might be recovered, such as over-ceiling moneys taken in violation of OPA regulations, which the purchaser or the Price Administrator had a year within which to sue for, the title to the money was not unquestioned until the expiration of that time, and that after the expiration of that time, one could then claim the money, report it and pay taxes on it. Steinberg testified that he

took the money which Gould offered him, reported it and paid taxes on it.

Gould and one of the distilleries he owned or had an interest in, Dowling Bros. Distilling Company, were indicted in the United States District Court in 1945 on forty-eight counts, charging violations of the Emergency Price Control Act, by selling distilled spirits at prices in excess of ceiling prices fixed by the OPA. It was charged that the transactions occurred between June 26, 1943 and December 31, 1943. The defendants were both convicted. Gould was sentenced to serve six consecutive years and to pay a fine of $240,000.00, and the company was fined $240,000.00. An appeal was prosecuted and had not been decided when Steinberg went to trial at Dallas, Texas on September 9, 1946.

Gould was offered by the petitioner as a witness. He was asked about his transactions with Steinberg in the whiskey business, and declined to testify and claimed his privilege, stating that he had an appeal pending in his case and that his answers might incriminate him on another trial. The court overruled the contention and required Gould to testify. He was asked (Tr. 985) if he did not during 1943 receive from Alex Josselson, Edward J. Baumer, Ronald Munson, Harry J. Rothman and Michael J. Friedman a sum in excess of one and a half million dollars over and above the ceiling price of the whiskey he shipped them. This testimony was objected to. Mr. Meacham, petitioner's

attorney, at Tr. 986, stated to the court that the only issue in the case on trial was whether or not Steinberg paid to Gould the money which the government asserted was income to Steinberg; that Steinberg desired to show Gould's method of doing business and what he required and demanded of his customers. The court sustained the objection and held the testimony was irrelevant and not connected with the trial of Steinberg. (Tr. 987)

Gould was then asked whether or not Steinberg had paid to him certain specific sums of money in cash by registered mail or express package, the total amount on the different days being approximately the $891,000.00. Gould denied each transaction asked about and denied that he received the amounts of money or any part of them in cash from Steinberg.

Gould was asked, at Tr. 988, if he did not in a certain room in a hotel in New York in November, 1944, pay back to Steinberg approximately $300,000.00 in cash and tell Steinberg to report it as his, Steinberg's, income and pay taxes on it. Gould denied paying back that amount or any part of it.

At Tr. 1031 Steinberg offered the witness, Alex Josselson, who had been one of the witnesses who testified for the government at the trial of the case against Gould and his distillery, and Josselson was asked whether or not he paid in 1943 over $300,000.00 in cash to Gould, which was over-the-ceiling prices for whiskey. This was objected to.

Counsel for Steinberg stated to the court that the government was contending in its prosecution against Steinberg that he had no records to show the payment of any money to Gould and had no receipts from Gould, and the only way Steinberg could meet the government's case was that he be permitted to show the practice, scheme and system carried on by Gould, and this would explain why Steinberg had no receipts. Mr. Meacham, at Tr. 1036, stated that Steinberg desired to show that those who bought whiskey from Gould during 1943 had to pay over-ceiling prices in cash to Gould, and never got any receipts. That Steinberg had six or eight witnesses in attendance on court who would testify as to their transactions with Gould in this regard. The court declined to hear the testimony of Josselson. It was called to the attention of the court that Edward J. Baumer, while on the witness stand for the government, had testified as to his transactions between June 30 and December 20, 1943, when he paid a total of $230,388.50 upon Gould's demand for over-ceiling prices, and that he was required by Gould to collect the over-charge and then call Gould on the phone and arrange a time so that he, Baumer, could go to Gould's office and pay him the money in cash. (Tr. 398) That Josselson's testimony was along the same line as Baumer's. The court then on September 17, 1946, struck out the testimony that had been given by the government witness, Baumer, on September 10, 1946.

Steinberg offered the witnesses, Ronald Munson, Harry J. Rothman and Michael J. Friedman, who would have tes-

tified as to their whiskey transactions in 1943, that Gould demanded over-ceiling prices and required the moneys to be paid to him in cash in person in his office in Cincinnati; that they paid the over-ceiling prices to Gould in cash in amounts such as a million and three hundred thousand, more than three hundred thousand, more than two hundred thousand dollars, etc., and that no receipts were obtained.

The Circuit Court of Appeals affirmed the action of the trial court which declined to permit any of the testimony above referred to, though it was urged that the testimony would support or tend to support Steinberg's testimony that Gould had demanded of him over-ceiling prices for whiskey and required the money to be paid to him in cash in person, and would support Steinberg's testimony that he paid to Gould in cash all of the over-ceiling money except his commissions or brokerage, and would also support or tend to support Steinberg's testimony that he sent some of the money by express package and other by registered mail, and that the other money was carried in cash and paid to Gould after having been obtained from the First National Bank in Dallas or the bank in Cincinnati. This would tend to support Steinberg's testimony as to why there were no checks to Gould and no receipts from Gould.

Steinberg offered the witness, Tannenbaum, to testify as to what was said in his presence in New York in November, 1944, when Gould paid back to Steinberg approximate-

ly $300,000.00 in currency and told him to report it and pay taxes on it. The action of the trial court in refusing this testimony was affirmed by the Circuit Court of Appeals.

Steinberg offered the witness, George Theunker, as to his conversation with Gould relative to Theunker's collection of illegal overcharges or premiums for whiskey, and as to Gould's suggestion that Theunker file an amended tax return showing the overcharges as the witness' income, and that Gould would pay the expenses in that connection. It was stated that Steinberg would testify that Gould had substantially the same conversation with him. The action of the trial court in refusing this testimony was affirmed by the Circuit Court of Appeals.

It was pointed out that the issue in the case was who finally received and kept the over-ceiling moneys paid to Steinberg in certain whiskey transactions. Steinberg's customers said they paid the money to Steinberg. Steinberg admitted receiving the money, but he claimed that under his trade with Gould from whom the whiskey was bought, he was only to receive a brokerage or a commission in the transaction. Steinberg testified that he accounted to Gould on every transaction, calculated the brokerage, took it out, and paid the balance to Gould, paid it as Gould demanded or required, in cash, and got no receipts. Gould denied this.

The Circuit Court of Appeals said on page 4 of its opinion:

> "The crucial questions for the jury were the credibility as a witness of Steinberg, and of Gould, who was offered as a witness by the defense, but who testified as he had in his own trial, that Steinberg had never paid him any excess sales money, nor had he given Steinberg the $352,000.00 in November, 1944" etc.

In referring to the offered testimony of the others who had whiskey transactions with Steinberg, the Circuit Court said:

> "The evidence offered did not go to the extent that Gould had a rule or uniform practice of business, but only that he had required cash of those customers. There may have been others who were dealt with otherwise. An endless enquiry might be opened up. For the purpose for which it was offered, we think the evidence not relevant."

The transactions of others with Gould during the same time were, in our opinion, relevant, as directly bearing upon Steinberg's defense, as corroborative of his testimony and to impeach Gould on the vital issue in the case, and the jury had a right to hear it and it was for them to weigh. As said by this Court in *Home Insurance Co. vs. Weide et al*, 11 Wall. 438, 20 L. Ed. 197:

> "It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy,

it should go to the jury. It would be a narrow rule and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact."

In *Holmes et al vs. Goldsmith & Co.*, 147 U. S. 150, 37 L. Ed. 118, the court said in part:

> "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legislative argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the enquiry, or to assist, though remotely, to a determination probably founded in truth.' Stevenson vs. Stewart, 11 Pa. 307."

Chitwood vs. U. S., (CCA 8th), 153 F. 551. Chitwood was indicted for stealing a watch fob from a letter in the mail. The government offered witnesses who testified they saw Chitwood open the letter and take the fob out. Chitwood denied this and testified that the fob was out of the letter when he found it on his desk; that letters often were worn or torn and the contents fell out. Chitwood offered others who worked the desk to show that frequently letters were torn, worn, unsealed and broken open

when they were received. The trial court refused this testimony. The Circuit Court reversed the case on the exclusion of this testimony, and said:

> "A sharp and vital issue was thus presented for the jury. *** Such facts would be a circumstance tending to support the defendant's theory. Its value might not be great as against the other direct and positive testimony with which the trial court compared it and on account of which rejected it; but that was for the jury, and not for the court to decide. The defendant had an undoubted right to buttress his own testimony by any and all circumstances and facts fairly tending to support it, and we think the facts offered to be proved by him were admissible for that purpose. For the error in excluding that evidence, the judgment must be reversed."

The testimony of the other people who had whiskey transactions with Gould would tend to explain why Steinberg withdrew large amounts from the bank in Dallas, Texas, and the bank in Cincinnati, Ohio, and the frequent visits Steinberg made to Gould's office, when he went into the private office of Gould with a package under his arm, and came out without the package; why on one occasion Gould's secretary went into Gould's private office while Steinberg was there, and Gould's desk was piled with stacks of currency (Tr. 1056-1060). This testimony would tend to show why Gould demanded the over-ceiling money be paid to him in his office in cash; it would tend to show why Steinberg had no checks to or receipts from Gould as to any over-ceiling money paid to Gould. Steinberg's cus-

tomers paid him the over-ceiling money with their checks or drafts; the money was traceable directly to Steinberg, there was no dispute about this with the customer or with the government, but Gould was to receive the over-ceiling prices for the whiskey bought from him and, according to Steinberg, it was all paid to Gould, less Steinberg's commissions. Steinberg was entitled to show, if he could, why Gould required the over-ceiling money to be paid to him in cash not traceable by checks or receipts. It is most unfair not to permit Steinberg to show every fact or circumstance that would tend to show who claimed and who finally received and kept the money paid for Gould's whiskey, and why he paid cash to Gould and had no checks to or receipts from Gould, and then to allow the prosecuting attorney to argue that Steinberg had no defense because he did not have checks or receipts.

At Tr. 1515 the prosecuting attorney said Steinberg received from the customers $1,788,839.53 and he paid out $825,459.39. The attorney further said:

> "Now that is what he paid out, according to the record in evidence. I do not want you to understand that that figure includes any amount he claims he paid to a man by the name of Robert Gould. It does not. That includes only what he paid out, or record evidence in this case."

Tr. p. 1522:

> "There is no record in all the evidence of this case of the payment by Alex Steinberg of one penny to Rob-

ert Gould, that is, record evidence. The only evidence in this case is his own testimony, and have you observed that in the framing of his defense here, he has contrived to have it that only two people can tell you whether or not he did give any money to Bob Gould, and that is himself and Bob Gould himself. And Robert Gould testified on this stand that he did not get any money. Oh, the beautiful advantage of the records, if the jury please; the records speak for themselves, and they are self-evident, and there is no record in this case he ever gave one dime, one penny, to Robert Gould."

At Tr. 1523, speaking of the interest Steinberg had:

"Just the greatest interest one can have, that of a defendant who would persuade you, beguile you, lure you, by his incredible testimony, into believing him innocent in this case, to the end of accepting his testimony," etc.

At Tr. p. 1525:

"Alex Steinberg played this game for no small stakes. His stakes were high. He played for millions, not pennies, and he made nearly a million in one year, and you know from this evidence, gentlemen, that he kept it, or certainly a major portion of it."

At Tr. p. 1529:

"In framing a defense of this case, with what problem was Alex Steinberg confronted? He knew the records were going to trace the black market into his hands. He had to get rid of his. How could be get rid of it? He couldn't find a check or a money order, or, if you please, a piece of New York exchange, be-

cause all of these are matters of records. *** But, he could not say, he just could not, that he sent Gould money by checks or such, he just could not confront the bank records, because they would prove him false. If he said he sent Bob Gould any money, by bank checks, or exchange. He had to get rid of that money by cash, and he had cash, he had plenty of cash. *** So, he had some cash, he had converted it, to hide it out. *** So, you see, when they came along to finding a defense in this case, the cash came in handy. It had then served a useful purpose, which he never thought it would. It offered him a means to say, without any risk of danger, of being checked up on, or without danger of any record coming in to confront him, (He said no one else was there.) to be able to say, I gave that cash to Bob Gould."

At Tr. p. 1568:

"Another thing that you and I don't do. We don't carry fifty or sixty or one hundred thousand dollars in currency around in a paper sack, or put it in a cookie box and label it something else besides what it is, I forget now, value it at $500.00 and ship it across the country to a confederate over on the other side. Honest people don't do that. Oh, well, they dismiss all that. That is mere monkey business, I suppose. He was just passing the money on to Gould. Just passing it through. None of you gentlemen ever did a thing like that. That is not honest. That is not frank, open and aboveboard, and any body that does it would not hesitate to get on the stand and tell you any story under the sun, whether it was true or not."

At Tr. p. 1569:

> "Alex Steinberg did not keep any records of his liquor business. He had his traveling expenses perfect. He had his stock market transactions perfect, because he knew, of course; they could catch him on that. He had his liquor commissions perfect, because he didn't make any big money on that. He reported what he made on that, but when they got right down to the long green, his greed got the better of him, and that is where he slipped a cog. He just did not report it, because he was in the ninety per cent bracket, and he wouldn't get to keep it."

The testimony of Josselson, Munson, Rothman, Baumer and Friedman, which the court excluded, would have tended to show who charged and collected over-the-ceiling prices when Gould sold his whiskey. If Gould and his distillery were convicted for selling in 1943 whiskey and for demanding and receiving over-the-ceiling prices on the sales, and Josselson, Munson, Rothman, Baumer and Friedman paid to Gould several million dollars for the whiskey they bought from him and his distillery, why would Gould sell to Steinberg and his customers and let Steinberg make a million on the sale of Gould's whiskey? What Gould demanded of Josselson, Munson, Rothman, Baumer and Friedman would have some bearing on what Gould required of Steinberg. The issue was what did Steinberg get out of his whiskey transactions with Gould. The court erred in not letting the jury hear how Gould operated in the black market.

The court erred in not permitting Ferdinand Tannenbaum to testify as to what was said and done in his presence in the hotel room in New York when Steinberg said Gould paid him back approximately $300,000.00 in currency, and told Steinberg to report it and pay taxes on it. The court refused to permit Tannenbaum to testify, but permitted the prosecuting attorney to argue to the jury: (Tr. p. 1520)

> "Alex Steinberg testified to you that in 1944 Robert Gould called him to New York and said 'I have been re-indicted' or 'I am about to be re-indicted and I have got to get rid of some money, I can't afford to have that evidence against me'. Will you take this money and take it to Texas, and report it as yours? Gentlemen, he says he did, he says he did. There is hardly evidence in this case, gentlemen, to justify that belief, in that fantastic tale."

At Tr. p. 1220-1226, Steinberg offered as his witness Ferdinand Tannenbaum, who was Gould's attorney, to testify as to what happened on the occasion and what advice the tax attorney gave Steinberg as to reporting and paying taxes in 1944 on overage money which went through his hands in 1943. The government objected to the testimony and the court declined to permit the witness to testify.

While arguing to the jury what Steinberg testified to as happening on the occasion Gould called him to New York, the prosecuting attorney said: (Tr. p. 1527)

"and he went on up, and Gould said, 'Here is $352,-000.00. I want to get rid of it, you take it back to Texas, and report it as your income'. Gentlemen, that testimony is so fantastic, so improbable, and so unbelieveable, if you please, that I hesitate to comment on it. But let me point out just a few of the improbabilities. Why would Robert Gould have to get rid of that money? His books didn't show any money. You remember his auditor, Chester, testified that he had examined every one of the books, the company's books, and the personal books, and there wasn't any black market money on them. And that two certified public accounting firms had examined them and there wasn't any black market on them. *** So, the records, the books, did not show any black market. There wasn't any books he had to get that black market money off of. And, if he had his money hid out, so that government could not even find it, why would he give it to Alex Steinberg to bring it down here? If he had it so well hid out, they couldn't find it, it was hid out, gentlemen, and if he gave it to Alex Steinberg to bring down here, he just invited discovery. That just doesn't make sense. Oh yes, he said he told his lawyer about Robert Gould giving him this money, and the lawyer advised him to file a return, and the return said it was income. Now, gentlemen, you know that did not happen."

The record shows, at Tr. 1223, that Tannenbaum testified, in the absence of the jury, that Steinberg asked him about reporting in 1944 overage money which went through his hands in 1943; that he told Steinberg that the Court of Claims had decided in the Greenwald case

under somewhat similar circumstances that until the person's title to funds had become unquestioned, he might not be charged with the funds as his income. Tannenbaum also testified that Steinberg told him that his Texas counsel had so advised him, and Tannenbaum said he probably had a very good case on that—the Greenwald case.

While the record does not very clearly show what Tannenbaum's testimony would have been relative to the conversation between Steinberg and Gould in the room in the hotel in New York on November 20th and 21st, 1944, when, according to Steinberg's testimony, Gould asked him how much over-ceiling money he, Steinberg, had paid him in 1943 and he said that it was more than three-quarters of a million dollars and Gould said he didn't think it was that much and Gould offered to and did pay back to Steinberg approximately $352,000.00 and told him to report it as his income and pay taxes on it, still Steinberg was entitled to the benefit of Tannenbaum's testimony, whatever it might have been, with reference to this occurrence and what was said. The trial court misunderstood the purpose of this testimony and apparently was passing on the question of whether or not Tannenbaum's advice as a lawyer, that a man was not required to report as his income moneys which were in his hands so long as the title to the money was questioned, was sound legal advice. The Circuit Court of Appeals misunderstood the purpose of the testimony

and apparently passed on the same question as the trial court, as to whether or not the legal advice was good. That was not the question before the court. It is clear to our minds that Tannenbaum should have been permitted to testify as to the occurrence and what was said in his presence. He was a disinterested witness and his testimony was material to the vital issue in the case. The trial court told the jury that if they found that Steinberg paid the over-ceiling money to Gould as he claimed, then Steinberg was not guilty of the charges in the indictment. The Circuit Court of Appeals said the crucial issue in the case was the credibility of Steinberg and Gould as to who received the over-ceiling money. Certainly, a lawyer, elevator operator, bell boy, or whatever he might have been, should have been permitted to testify as to what was said in a conversation between Steinberg and Gould in which they discussed how much over-ceiling money Steinberg had paid to Gould and whether or not Gould paid or offered to pay any of it back to Steinberg. In our minds, there can be no question that the trial court and the Circuit Court of Appeals erred in excluding this testimony.

In our opinion, the testimony of Josselson, Friedman and others as to their being required to pay to Gould in person in cash over-the-ceiling prices for whiskey they bought from Gould, and the testimony of Theunker as to statements made by Gould as to how he thought overcharges on

his whiskey transactions should be reported for income tax, was material and relevant to the vital issues in this case, to-wit:

(a) Who got the over-the-ceiling moneys when Robert Gould sold his whiskey; and

(b) Why Steinberg had no checks to or receipts from Gould; and

(c) Why Steinberg filed his amended tax return in 1944 and paid income taxes on approximately $350,000.00 as finder's fees on 1943 whiskey transactions.

It was for the jury, and not the court, to say what weight should be given the testimony, and Steinberg did not have a fair trial when he was denied the benefit of this evidence.

The opinion of the Circuit Court of Appeals in denying the admissibility of the evidence is in conflict with the opinions of the Supreme Court, as pointed out, and in conflict with the opinions of other Circuit Courts of Appeals.

PROSECUTING ATTORNEYS' ARGUMENTS

In our brief we have quoted some portions of the arguments of the prosecuting attorneys. They are reported in full in the Transcript (Tr. 1507-1532 and 1563-1574). The respective attorneys devoted about two-thirds of their time to a bitter castigation of petitioner as a black mar-

ket operator in whiskey during a time when our government was engaged in the noble effort of fighting inflation. The attorneys stated to the jury what petitioner testified to, and incorrectly stated that petitioner admitted under oath that he daily, almost daily, for nearly a year violated the federal law, that he flouted the law, that he cynically admitted that he violated the law; that he played the game for big stakes, that he made a million dollars and kept it all, that he told Gould that all he wanted was money and lots of it. The attorneys stated that Steinberg's testimony was fantastic, that he had framed his defense, and that any one who would make a false statement would go on the witness stand and testify to anything. That he had the temerity to offer evidence of his good character. These arguments were prejudicial, because they attempted to engender passion and feeling against Steinberg by saying he admitted he made a million dollars in what he knew were unlawful black market operations.

The District Attorney injected racial prejudice into the case. He said that Steinberg's motive in this case was—

> "written all over him and all over the testimony in this law suit, and that is greed, and just after the almighty dollar. Why, in his own words he said, 'Mr. Gould, you write the rules, I will follow them religiously. All I want is money and lots of it.' ***
>
> I say to you greed is his motive. It reminds me of some of the famous characters in history. * * *

> Shylock, one of the most famous characters of Shakespeare, was motivated by greed, and as I recall the story, he got in trouble." (Tr. 1565)

In its brief the government undertook to justify this prejudicial, inflammatory and unfair argument by saying that Mr. Young's allusion made to those of Jewish descent shows that Mr. Young, the District Attorney, was a literary fellow who cited classical examples. It is apparent that the government was floundering for something to attempt to justify the District Attorney's speech, because Mr. Young was not making or attempting to make a classical address; he was not concerned with impressing the jury that he was a literary fellow, he was trying to use every resource he had to impress the jury with his contempt for petitioner and was using a reference which he thought would challenge the jury's attention to petitioner as a contemptible, greedy, grasping millionaire of Jewish descent. Mr. Young knew that the reference to one as a Shylock who had made a million dollars is never applied except to one who ought to be despised.

We know that it is difficult to lay down proper standards or rules to govern the limitations that should be placed upon prosecuting attorneys' speeches, because each more or less depends upon its own facts and surroundings. However, we are convinced that the rule laid down by the Circuit Court of Appeals in this case is contrary to the opinions of the Supreme Court in other cases, and it should

not be the rule in any case, and the opinion of the Circuit Court should not be permitted to rest where it is, because, to say the least, it is susceptible of much misunderstanding and misapplication. We refer to the portion of the Circuit Court's opinion (Tr. 1696) as follows:

> "The speeches are reported in full, and appear to us to be logical and not inflammatory, and not exceeding in vigor what the nature of the case authorized."

We do not think it needs argument to show that this pronouncement of the law is dangerous, because it leaves the latitude to be allowed in prosecuting attorneys' speeches to be determined by the variant views of the different courts that may be called on to decide the question.

The opinion of the Circuit Court of Appeals is in conflict with the opinions in—

Berger vs. U. S., 295 U. S. 78, 79 L. Ed. 1314

Viereck vs. U. S., 318 U. S. 236, 87 L. Ed. 734

Pierce vs. U. S., 86 F. (2d) 949

Estep vs. U. S., 140 F. (2d) 40.

TRIAL JUDGE'S EXPRESSIONS AND INTIMATIONS

We are reluctant to criticize the actions of any judge. We have the utmost respect for the trial judge and for the members of the Circuit Court who reviewed the record in

this case. They are clean, capable, experienced and most admirable persons and judges. They would not intentionally or consciously do any litigant an injury. They have the highest regard and respect for the positions they respectively occupy. We believe that a reading of this record will convince any one that the trial judge was nettled and nauseated and that he unconsciously let it become apparent, and we cite a few instances in support of our statement.

The court clearly manifested a disbelief in the merit of petitioner's defense. Petitioner testified that he passed all of the over-ceiling moneys, except his commissions, on to Gould, that some times he carried a large quantity of currency to Gould, some times he sent it by express and some times by registered letter. A Railway Express clerk was offered as a witness who testified as to the shipment of certain express packages by Steinberg to Gould and stated that one package had a declared value of $500.00. The court said (Tr. 446):

> "Does the express company take a very large sum of money, knowing what it is, at a small valuation?"

While petitioner was on the stand he testified that he had not been given a hearing by a tax administrative official. The court said (Tr. 1382):

> "I think, counsel, that it would clearly be inadmissible, it does tend, like in most criminal contests, to try to throw something on the other fellow too, as you

> go along, but when you are dealing with Uncle Sam, you can't do that so well, as you can when you are knocking another fellow now; because Uncle Sam has to collect his taxes through agents; if they think something can be gained by a further conference, why, they are practically the judges of it."

When Ferdinand Tannenbaum was on the witness stand, he was asked whether or not he gave Steinberg certain advice as to the payment of income taxes, and there was a discussion as to whether or not Steinberg could rely on what Tannenbaum said when Tannenbaum was Gould's attorney and not paid by Steinberg for the advice Tannenbaum gave him. The court said (Tr. 1028):

> "I don't think a man is warranted in buttonholing a lawyer on the street and getting a half-baked opinion and then claiming immunity because he got the wrong advice."

While the prosecuting attorney was arguing the case to the jury he stated in substance that the defendant while on the stand testified under oath that he had engaged in large black market operations and made a million dollars. Objection was made that petitioner did not so testify. It was never suggested or contended by any one that petitioner did testify as the prosecuting attorney stated, but the court said: (Tr. 1520)

> "Well, that is a deduction of counsel, we will just let the jury weigh it."

The Circuit Court of Appeals in its opinion at Tr. 1695 said:

> "The statement that Steinberg violated the law every day was an exaggeration, but perhaps an allowable inference."

After the court charged the jury, Mr. Meacham, counsel for petitioner, asked the court that he be permitted to incorporate in the record his objections to the court's charge and the court stated that counsel need not recite them and the following occurred (Tr. 1581):

> Mr. Meacheam: "If Your Honor please, I dislike to come down here and disagree with Your Honor with what the rules require."
>
> The Court: "You may write out a Bill as long as this book, just so you stay in the record, and I will sign it for you."

The court manifested impatience with petitioner's defense. A witness was being examined as to whether or not the record reflected that certain moneys were carried in books as profits or commissions, and the court said (Tr. 873):

> "Just what transpired, how it was entered, must control the case. You might call a rose by some other name, and it would still be a rose."

Counsel for petitioner was examining a witness and asked the court to instruct the witness not to make voluntary statements. The court said (Tr. 839):

"I am going to instruct counsel also."

At Tr. 840 the court said:

"Your instruction to the witness is with some heat and you must call on the court to give the instructions."

Mr. Meacham: "Yes, sir".

The Court: "but not to instruct him and then ask the court to instruct him further."

While the witness, Harrold Stern, was on the witness stand as a witness for the defendant, he was asked whether or not he saw a microphone in the fire place in the room occupied by Steinberg at the hotel. The government was objecting to the testimony, and the court said at Tr. 1204:

"I am going to hear the whole thing, and I am going to pass on counsel as well as this case."

At Tr. 1205:

Mr. Meacham: "I would like to have it understood, Your Honor, that I am not incurring Your Honor's displeasure by proceeding with this line of examination."

The Court: "The court is wholly impersonal, it is not a man sitting as such, it is a United States court and you cannot offend the bench."

Mr. Meacham: "Yes, Your Honor."

The Court: "All the bench, the court, expects of you is to conduct yourself like a lawyer, and stay within the rules of evidence, and when you knowingly go without those bounds, the court will deal with you."

Later while still talking about the microphone and where it was located, who placed it, etc, the court said that if the government was guilty of wrongdoing, we ought to know it, and further stated (Tr. 1207):

> "and if they are not, we might as well understand that counsel is seeking unethical procedure."
>
> Mr. Meacham: "Your Honor, I object to Your Honor's remark, and I am here to do my best."
>
> The Court: "Proceed. It is a matter of record."
>
> Mr. Meacham: "I ask the jury be instructed to disregard Your Honor's charge that I am guilty of unethical conduct." (Tr. 1208)
>
> The Court: "The court has not said it, but he has you under observation in this connection. Go ahead."

Later the court excused the jury and heard the matter to a conclusion and publicly reprimanded Mr. Meacham for his conduct and fined him $50.00. Mr. Meacham stated that his offer of the testimony in question was based upon his practice in the courts since 1915. The court said (Tr. 1213):

> "Counsel, a lawyer of your ability could scarcely be in good faith in asking these questions."

At Tr. 1046 the following is recorded:

> Mr. Meacham: "Your Honor, please, during the recess the witness, Munson, approached me in the corridor and asked me what I asked him and I repeated the question and he said 'I thought you meant in my

> office'. So I would like to recall him to permit him to correct his testimony."
>
> The Court: "Just let the record show that he offered to testify to the thing you wanted, and that the court ruled it out."

The court manifested disgust. Counsel for petitioner asked a witness whether or not petitioner was a large contributor to charity. Objection was made, and the court said (Tr. 1083):

> "I think, in a certain book, 'Gone With the Wind', one of the most charitable persons in there was of bad reputation otherwise."

Counsel for petitioner objected to the remark of the court, and the court said:

> "Gentlemen of the jury, the court makes no personal application to this defendant in that respect; if you so understand, you will disregard it. We were simply illustrating to counsel that people had various traits of character, some that were exemplary, and some that were not so much."

The Circuit Court of Appeals in its opinion at Tr. 1699 said:

> "The remark was out of place, but we think it was cured by its withdrawal."

In our opinion the so-called withdrawal of the remark only served to further impress the jury with the court's opinion of the petitioner,—that while he might be charitable, the court wanted the jury to understand that the court

thought the petitioner had another trait of character, not exemplary.

The matters we have pointed out above as showing the trial court's departure from disinterestedness and impartiality occurred in the presence of the jury and if it might be said that any one of them was just out of place and would not impress the jury with the court's feeling, still we think that when they were cumulative, as they were, unquestionably the jury was impressed that the trial court had a very fixed opinion unfavorable to the petitioner. This is further manifested by the extreme penalty imposed. The sentence of eight years in the penitentiary for a man over sixty years of age for an income tax violation was, in our opinion, very severe; it was practically a life sentence. If our statistics are correct, this sentence was, up to that time, the highest imposed for such a violation with one exception, that imposed on Al Capone.

The Circuit Court of Appeals in its opinion (Tr. 1699) in passing upon the remark of the trial judge relative to the character in "Gone With the Wind", said:

> "The remark was out of place, but we think it was cured by its withdrawal. The ruling on the evidence offered was correct.
>
> Other things are brought forward as showing hostility by the judge. These rulings as such were not erroneous. The report shows the judge ruling for one side about as often as the other. We are not impressed

that there was any general hostility to the defendant or his counsel."

The trial court may have ruled correctly, but the expressions and intimations that accompanied the rulings were the things that were complained of. A mere showing that the trial judge ruled for one side about as often as the other certainly does not show that there has been a fair trial. Many just "out of place" remarks by the trial court could show a feeling of hostility and deprive one of a fair trial. Juries look, we might say, with reverence on the trial judge, they listen intently to what he says, and the slightest suggestion from him is often controlling. It should not be said that when the judge did not show any general hostility toward the defendant, he has had the fair trial guaranteed to him by our Constitution.

The opinion of the Circuit Court of Appeals on the challenged expressions and intimations of the trial judge, that they were not prejudicial because they did not show a general hostility, is in conflict with the opinions of the Supreme Court and other Circuit Courts of Appeals in the following cases:

Starr vs. U. S., 153 U. S. 614, 38 L. Ed. 841

Quercia vs. U. S., 289 U. S. 466, 77 L. Ed. 1321

U. S. vs. Murdock, 290 U. S. 389, 78 L. Ed. 381

Adler vs. U. S. (CCA 5th), 182 F. 464

Hunter vs. U. S. (CCA 5th), 62 F. (2d) 217

Wallace vs. U. S. (CCA 6th), 291 F. 972

Rudd vs. U. S. (CCA 8th), 173 F. 912

Weare vs. U. S. (CCA 8th), 1 F. (2d) 617

Hobart vs. U. S. (CCA 6th), 299 F. 784

CONCLUSION

We believe petitioner did not have a fair trial, because—

1. He was denied the benefit of evidence material to the crucial issue in the case.

2. After being denied the benefit of this evidence, the prosecuting attorneys were permitted to argue that petitioner's defense had failed because there was no evidence to support it, and that petitioner's testimony was false, fantastic and framed, and there was nothing to corroborate it.

3. The prosecuting attorneys' speeches were prejudicial and injected racial feeling into the case, and the prosecuting attorneys told the jury that petitioner was a greedy, grasping Shylock, and said attorneys incorrectly stated that petitioner admitted he made a million dollars out of black market whiskey transactions.

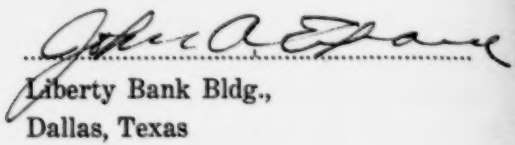
4. The cumulative expressions and intimations of the trial judge in the presence of the jury impressed the jury

that the judge thought the petitioner had offered no defense and that he was guilty.

The opinion of the Circuit Court of Appeals on the issues raised is contrary to the opinions of the Supreme Court and other Circuit Courts of Appeals.

The petition should be granted and the case reversed.

Respectfully submitted,



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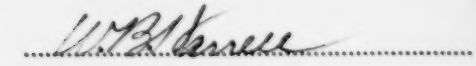
Dallas, Texas



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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 319

ALEX STEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 1663–1671) is reported in 162 F. 2d 120.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 12, 1947 (R. 1671). Petition for rehearing was denied on August 11, 1947 (R. 1694). Petition for a writ of certiorari was filed on September 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February

13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to admit the testimony of certain witnesses called by the petitioner.

2. Whether the conduct of the trial court constituted prejudicial error.

3. Whether the conduct of the prosecutor constituted prejudicial error.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 145 [as amended by Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 136]. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> (c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony,

and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code. (26 U. S. C. 1940 ed., Sec. 145.)

STATEMENT

Petitioner was indicted in the Northern District of Texas on four separate counts. Counts one and two charged that the petitioner wilfully attempted to evade and defeat, by filing and causing to be filed false and fraudulent returns on behalf of himself and his wife, substantial amounts of taxes owing on their community net income for the calendar year 1943, in violation of Section 145 (b), Internal Revenue Code. The third and fourth counts charged that petitioner filed and caused to be filed income tax returns which he did not believe to be true in that they contained the false statements set forth in counts one and two, respectively, in violation of Section 145 (c), Internal Revenue Code. The total net income charged to have been understated was $892,125.47, with a resultant tax deficiency of $870,109.06 (R. 2–8). Petitioner was convicted on all four counts and sentenced to imprisonment for a period of eight years, and fined a total of $24,000 (R. 1629–1630).

The falsity of the returns was predicated on the petitioner's failure to report as income profits realized from liquor transactions during the year 1943. At the trial, evidence adduced by the prosecution showed undisclosed profits from these

transactions in the amount of $891,571.96 (R. 823). Of this amount, $352,000 was reported by the petitioner in his 1944 return, although admittedly derived from fees received in 1943 (R. 1462). Evidence was also offered that at one time petitioner had admitted he kept all of the monies from these transactions (R. 1461) and on another occasion that he had a fifty-fifty deal with one Robert Gould and paid $495,100 of this profit to Gould (R. 1467–1470).

Petitioner testified at the trial that he had had an arrangement with Gould to sell whiskey at over-ceiling prices as Gould's agent (R. 1294, 1418) and that he had paid Gould in cash the sum of $846,275.24 and retained only $65,699.40 as compensation for services rendered and $60,699.42 which he characterized as loans from Gould (R. 1299, 1308–1310, 1316–1340, 1358). Petitioner further testified that in November 1944, Gould gave him the sum of $352,000 with the request that he report it for taxes, and that on the advice of Gould's attorney, he took the money to Texas and returned it as income in 1944. (R. 1375–1378.)

Petitioner called Robert Gould as a witness and, in response to a question as to how much money petitioner had turned over to him in 1943, Gould denied that he had received any money from petitioner. (R. 988.) Gould was then asked if during 1943 he had not received from other persons

approximately one and a half million dollars from the sale of whiskey. This question was objected to and the objection sustained by the court. (R. 985–986.)

The petitioner then offered as witnesses four persons who, it was claimed, had liquor transactions with Gould during the year 1943. It was stated that these witnesses would testify that they had sold whiskey for Gould during this year on a basis similar to the arrangement which Steinberg claimed he had with Gould. On objection, this proffered testimony was excluded by the court. (R. 1032, 1038, 1043, 1075.)

Petitioner then offered as a witness an attorney who was identified as Gould's lawyer. Petitioner's counsel stated that this witness would testify to the fact that he had advised the petitioner that he could report in his 1944 return income admittedly received by him in 1943. Upon objection, testimony of this witness was excluded (R. 1216–1227).

On appeal, the judgment of conviction was affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 1671).

ARGUMENT

1. The petitioner claims that the trial court committed error (Pet. 10) in refusing to let the witness Gould testify concerning the nature of transactions he had with other individuals during

the year 1943 (R. 985, 986). It is argued that the purpose of this testimony was to show a system or habit on the part of Gould with respect to his whiskey transactions. But there was no showing that the persons about whom Gould was to be questioned had any relations with the petitioner or had arrangements similar to those which the petitioner had with Gould (R. 987).

Under the circumstances, this evidence was irrelevant and immaterial and was properly excluded by the trial court. *Commercial Standard Ins. Co.* v. *Gordon's Transports,* 154 F. 2d 390, 394 (C. C. A. 6th); *Caldwell* v. *Commissioner,* 135 F. 2d 488, 490 (C. C. A. 5th); *Muschany* v. *United States,* 324 U. S. 49, 58. For the same reason, it was not erroneous for the court to reject the testimony of the other witnesses who, it was claimed, had dealings with Gould; the immateriality of such evidence is emphasized by the fact that while petitioner testified that he acted as agent for Gould in the sale of liquor (R. 1292), it appeared that the witnesses were dealers whose arrangements with Gould were likely to be quite different from that between petitioner and Gould (R. 1031, 1043, 1076).

Nor is the decision below in conflict with *Insurance Co.* v. *Weide,* 11 Wall. 438; *Holmes* v. *Goldsmith,* 147 U. S. 150; or *Chitwood* v. *United States,* 153 Fed. 551 (C. C. A. 8th), as alleged by petitioner (Pet. 13). These cases merely hold

that collateral evidence of a related nature is admissible for the purpose of establishing a course of trade or custom or habit. They do not support the contention that testimony concerning unrelated transactions with which petitioner was not concerned is admissible. The admissibility of collateral evidence depends on the circumstances of the particular case (*Commercial Standard Ins. Co.* v. *Gordon's Transport, supra*), and its exclusion here raises no question of general importance.

The proffered testimony of Gould's attorney (R. 1220–1226), with respect to the advice given to the petitioner that he could report 1943 receipts as income in 1944 could only have been admissible on the grounds that it negatived intent. *United States* v. *McCormick,* 67 F. 2d 867 (C. C. A. 2d), certiorari denied, 291 U. S. 662. But the conference at which it was claimed that this advice was given was held in November 1944 (R. 1224), eight months after the commission of the crime with which the petitioner was charged. Hence, there is no basis for arguing that this testimony was probative of the intent of the petitioner at the time he committed the offense, and it was clearly self-serving and hearsay. *Malone* v. *United States,* 94 F. 2d 281 (C. C. A. 7th), certiorari denied, 304 U. S. 562. While petitioner claims that the testimony of Gould's attorney would tend to show that petitioner received approximately $300,000 from Gould, part of the money which al-

legedly had previously been given Gould by petitioner (Pet. 19–21, 45–48), the offer of proof and the testimony at the trial contained no such statement; so far as appears, Gould's attorney was simply advising him with respect to a hypothetical question (R. 1220–1227).

2. Petitioner asserts that he was prejudiced by the expressions and intimations of the trial judge, and cites several examples (Pet. 52–60) in support of his contention that the conduct of the trial court was prejudicial.

A close examination of the matters complained of by petitioner discloses that many of them involved the orderly procedure of the trial, and the proper efforts of the trial judge to confine the testimony to the real issues; the others involved the exercise of the trial judge's well-established prerogative to question witnesses and to comment on the evidence. *Glasser* v. *United States,* 315 U. S. 60; *Horning* v. *District of Columbia,* 254 U. S. 135; *Simon* v. *United States,* 123 F. 2d 80 (C. C. A. 4th), certiorari denied, 314 U. S. 694; *Moore* v. *United States,* 132 F. 2d 47 (C. C. A. 5th), certiorari denied, 318 U. S. 784; *Pfaff* v. *United States,* 85 F. 2d 309 (C. C. A. 7th). If at times the trial court spoke emphatically to counsel for petitioner, such emphasis appears to have been warranted since counsel persisted in asking improper questions after the court's ruling.

In his charge to the jury (R. 1574), the trial judge refrained from commenting on the evidence and instructed the jury that it was not to be influenced by any comments or opinions expressed by the court during the course of the trial (R. 1580). Thus there is no real question as to the fairness of the trial accorded to the petitioner.

3. Petitioner complains that he was prejudiced by the conduct and inflammatory remarks of the prosecutor (Pet. 21). An examination of the record, however, discloses that all of the remarks complained of were inferences logically drawn from the evidence in the case. Petitioner, not the prosecutor, developed the fact that he was engaged in black-market transactions (R. 123, 1220, 1370).

The prosecutor may allude to the fact that the accused has committed crimes other than those for which he is on trial, where evidence supporting the particular reference is properly before the jury and the comment is a deduction from that evidence relevant to a material issue in the case. Likewise, he may refer to, and draw unfavorable inferences from, the conduct of the accused shown by evidence properly in the case, when those inferences are relevant to an issue material to the case and to the character of the accused when character is in issue. In making such comment, the prosecutor may characterize the accused or his conduct in language which, although it con-

sists of invective or opprobrious terms, accords with the evidence in the case. *Baker* v. *United States,* 115 F. 2d 533 (C. C. A. 8th), certiorari denied, 312 U. S. 692; *Malone* v. *United States, supra; United States* v. *Wexler,* 79 F. 2d 526 (C. C. A. 2d), certiorari denied, 297 U. S. 703.

The record discloses that only one objection was made to the conduct now complained of; and when the court observed that the prosecutor's statement was a deduction of counsel which the jury should weigh, petitioner's counsel agreed (R. 1520).

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decision is presented. It is therefore respectfully submitted that the petition should be denied.

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SEPTEMBER 1947.

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No. 319

IN THE

Supreme Court of the United States

ALEX STEINBERG, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF CLARENCE N. GOODWIN AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

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ALEX STEINBERG, *Petitioner,*

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BRIEF OF CLARENCE N. GOODWIN AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.[1]

May it please the Court:

The facts involved in this case, so far as they are relevant, are clearly stated in the Petition for Certiorari and Supporting Brief. The purpose of this brief is to reinforce the Petitioner's statement of the grounds on which it is

[1] This brief is presented agreeable to the wishes of certain organizations who feel a profound interest in the question presented but who do not wish to take formal action or have their interest revealed in view of the possibility that some might believe that they were attempting to bring the influence of their organization into the matter. While this would be, of course, unjustifiable, it is felt that their position is proper. Naturally, they understand that if the petition for the writ is not granted, it will be because of reasons which the Court believe to be compelling.

believed that the situation calls for a review of the decision of the Circuit Court of Appeals and to amplify those reasons, if possible. It is the position of the writer that there is one among many statements in the argument to the jury of the District Attorney which makes a review appear definitely required and it is that matter which this brief is intended to present.

It will, of course, be necessary to refer to other prejudicial statements by court and counsel and to other erroneous rulings of the court, for the incident should not be considered wholly apart from the circumstance in which it was made.

The definite point is that the District Attorney injected destructive racial prejudice into the case by comparing the petitioner, a Jew, with Shylock. He said:

> "I say to you greed is his motive. It reminds me of some of the famous characters in history. * * * Shylock, one of the most famous characters of Shakespeare, was motivated by greed. * * *" (Tr. 1565, Petition 50-51)

It must be pointed out at once that the fact that the petitioner was a Jew was known and commented on by the judge in sentencing him. (Tr. 1596) The question here suggested was brought to the attention of the Court of Appeals in brief and argument but brushed aside and in the opinion totally ignored. In this it is suggested the Court decided "an important question of general law in a way probably untenable or in conflict with the weight of authority." That a widespread and deep racial prejudice exists in this country unfortunately cannot be denied and a reference to the Jewish antecedents of a party has been sustained as a ground for reversal in every case in which the point has been involved except the case at bar. It is significant that the existence of this prejudice and that a reference to Jewish antecedents demands a reversal of a judgment has been specifically decided by the Court of Civil Appeals of the State of Texas, where this case was tried.

In *Garrity* v. *Rankin*, 55 S. W. 367, the Circuit Court of Civil Appeals of Texas said:

> "Counsel for defendant in his argument to the jury made statements not warranted by the evidence and indulged in remarks as to some of the parties being Jews, etc., which were calculated to prejudice the minds of the jury against the plaintiffs' cause. The court admonished him to stay in the record and told the jury it was not proper for them to consider the race of the parties or witnesses referred to and defendant's counsel then said he withdrew the remarks about the Jews.
> * * *
> "The argument of counsel in the respect alluded to was very improper and tended to create a prejudice in the minds of the jury. Whether the action of the court was sufficient to eliminate the probable effect produced we will not decide, as the case will be reversed on the other grounds and it is not probable that counsel will repeat the impropriety on another trial."[2]

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2 Attention is also called to the following cases in courts of last resort in their respective states:

Hyman v. *Kirt*, 153 Mich. 113. At page 116 the Supreme Court of Michigan, after condemning counsel for referring to plaintiff as a Jew horsetrader, said:

"We need not determine whether the withdrawal of this expression and the instructions of the court cured the error as for the admission of testimony relating to other litigation, the case must be reversed and a new trial had."

Soloman v. *Stewart*, 184 Mich. 506. In this case the Supreme Court of the state held that reference to supposed sharp practices of Jews was a ground for reversal where his name and statements of counsel implied that the plaintiff was of "Semitic antecedents".

The court had already said in *Cluett* v. *Rosenthal*, 100 Mich. 193, that a reference to plaintiffs as "men of Jerusalem" and the following of a line of argument tending to impress the jury with the belief that their nationality should be taken as evidence against them, the Supreme Court reversed the judgment on that ground. (p. 200)

Colker v. *Connecticut Fire Insurance Co.*, 7 S. W. (2d) 502. At page 505 the Court of Appeals of Kentucky said:

While the prejudice against Jews may not be as deep or as widespread as in some of the countries of continental Europe, its existence among English-speaking people is shown by their history.[3]

"This was an action on a fire insurance policy. Attorney for defendant said: 'It is a dirty, nasty Jewish trick that plaintiff is now trying to beat the insurance company by a dirty Jewish trick.'" * * *

"It was very improper for counsel in his concluding argument to appeal to race prejudice and while there was no exception taken at the time, counsel did immediately move to discharge the jury which sufficiently raised the question." The judgment was reversed.

In *Pantelis* v. *Arsht*, 227 Ill. App. 488, the court said at page 492:

"The record discloses that in the closing argument to the jury counsel for appellee said: 'This defendant is a Jew. The Bible tells the story of the Jews. This immaculate and all-powerful Sam Arsht is trying to oppress this poor Greek. This poor ignorant Greek has rights just as sacred as the Jew, if his clothes are not as fine and his fingernails not manicured as nicely. This is the old story of the big fellow trying to eat up the little fellow. * * *"

By no stretch of the imagination can such language be classed argument. It could not in any way assist the jury in reaching a just and proper verdict and should never be uttered in a court of justice. It was calculated to poison and prejudice the minds of those whose duty it was to decide the case according to the law and evidence. The fact that the court sustained an objection thereto did not destroy its poisonous effect." (Although the judgments of this Appellate Court, of which the writer was formerly a member, are reviewable by certiorari, it is otherwise a court of the last resort.)

[3] It will be recalled that in 1290, during the Crusades and while the priesthood was exhorting the people in every town and hamlet to take part therein, a great cry was raised everywhere for the expulsion of the Jews, who were considered by the population generally as sharers in the guilt of the Crucifixion and were also hated on account of usury. It was for these reasons that Edward I ex-

It is suggested that the Circuit Court of Appeals in ignoring the point here raised not only acted "in conflict with the weight of authority" but "in a way probably in conflict with applicable decisions" of this Honorable Court.

The failure of the Circuit Court of Appeals for the Fifth Circuit to sustain the point in question is "in conflict with another court of appeals on the same matter." In *Skuy*

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pelled them from the Kingdom. It may also be noted that there was no attempt to lift or modify this ban until in the time of Cromwell, over 350 years later, Lord Fairfax asked in Council that the Lord Protector be given limited authority to moderate that ban in exceptional cases and in unusual circumstances. The continuance of the prejudice is evidenced by the fact that in the century following the expulsion Chaucer's "Canterbury Tales", which marked the dawn of English literature, tells a defamatory and revolting story of a cruel and atrocious murder of a Christian child of seven years by the "Jewry" with horrifying details in which avarice, usury and murderous hatred of Christians are alleged.

The telling of this story by an author, who spent many years in Italy and had such a breadth of culture and understanding, and telling it through the sweet lips of the tenderhearted Prioress reflects the continuance of the prejudice. Three hundred years later we have the same thought and feeling emphasized and enlarged upon in Christopher Marlowe's "Jew of Malta" and not long after that there appeared the character of Shylock in Shakespeare's "The Merchant of Venice" with which we are here concerned. It there will be noted that the traits of character portrayed are not presented as those of an individual but as characteristic of the Jew, and in this case again we must remember the breadth of culture and intelligence and humanity of the authority making the characterization. The language of the play must have been known to some or all of the jury.

Shylock is made to say:

"I hate him for he is a Christian,
But more for that in low simplicity
He lends out money gratis and brings down
The rate of usance here with us in Venice.
If I can catch him once upon the hip,
I will feed fat the ancient grudge I bear him.

v. *United States,* 261 F. 316, the Circuit Court of Appeals for the Eighth Circuit condemned an argument and statement tending to count upon prejudice against the Jews. At page 320 the Court said:

> "Later in his argument the speaker again referred to the testimony of the witness Lee, and stated in substance that he did not care how many Jews the defendant brought there to testify, or what they swore to, that he believed that the soldier boy swore to the truth, that he had no interest in the case, and that every word that he testified to was the truth, and in delivering this statement he emphasized the word 'soldier.' * * *
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> "The argument challenged was in effect a statement that in the estimation of the assistant attorney the testimony of one soldier boy, perhaps of one person who was not a Jew, to a disputed fact, was in his estimation of greater weight than that of all Jews, however truthful, upright, intelligent, and numerous, who had knowledge of the fact, and this statement was made to induce the jury to adopt that view, and to find the defendant guilty on the testimony of Lee, notwithstanding the testimony of four Jewish witnesses to the contrary. * * *

> He hates our sacred nation, and he rails,
> Even there where merchants most do congregate,
> On me, my bargains and my well-won thrift,
> Which he calls interest. Cursed be my tribe,
> If I forgive him!"

The publication of Shakespeare's works preceded the settlement of America and Shakespeare and the Bible constituted largely the substance of the settlers' literature.

It is suggested that the depth of the prejudice which has led the courts to characterize a reference to Jewish origin as poisonous is not generally understood by people of education and culture. The writer recalls that during the years when he was a partner of the late Adolph Kraus, who was for fifteen years or more and until his death President of the International Order of B'nai B'rith, he had long talks with him and tried to persuade him that prejudice and animosity against the Jew, particularly in this country, no longer existed, but without avail. Subsequent history has shown that Mr. Kraus was well informed and the writer was not."

"Counsel for the United States permitted his zeal and anxiety for success to carry him so far in this case that the conviction cannot be escaped that there was prejudicial error in this trial which prevented it from being fair and impartial."

"(4) The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention, but it fails to convince. * * * And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment. * * *

"Let the judgment below be reversed, and let the case be remanded to the court below, with directions to grant a new trial."

In considering whether the importance of this case is such as to warrant the Court in issuing a writ of certiorari, certain things said in the petition in the case of *Wan* v. *United States*, 266 U. S. 1, seem relevant. In that case counsel for the petitioner, who included the Honorable Charles Fahy, later Solicitor General of the United States, said at page 12:

"That this case is of importance is demonstrated by the fact that in and by the judgment complained of human life has been declared forfeit."

It is not suggested that human life has been declared forfeit by the judgment in the instant case but, as the sentence is for eight years and the court referred to his age as sixty-one and to his health, it must have been patent to the judge that he was, in reality, giving a sentence which in all probability petitioner could not outlive. What was said by the court in regard to his age and health rests on the petitioner's testimony as follows:

"At that time I had a heart attack, the doctors put me to bed and kept me in bed off and on, you might say, three and a half years. So I immediately put my house

> in order, canceled the contract, so I could function as a salesman again, it took me over three years to do that." (Tr. 1293)

While this is stated for the purpose of showing the probable effect of the sentence, it is noted that the imposition of such a sentence exceeding all sentences so far as known for like offenses, except in the case of Al Capone, and imposed in the circumstances named is further evidence of prejudice on the part of the presiding judge.

This is in addition to the evidence of prejudice shown by the fining of Eugene Meacham, Esquire, whose ethical standards may be inferred from his long service in the office of the Chief Counsel of the Bureau of Internal Revenue and his exceptional service in the Judge Advocate General's Office of the Navy where he was promoted to be a captain. The Circuit Court of Appeals agreed that the action of the trial Judge was erroneous, but said that as it was done in the absence of the jury "it was not error in the trial." It failed to note, however, that while the sentence was imposed out of the presence of the jury, the jurymen were permitted to separate at night and the sentencing was made a matter of comment in the local press and so could hardly have escaped the notice of the jurymen.

As a further ground for the allowance of the writ in the Wan case it was noted that "its correct decision is of great and widespread interest and essential to the certain and general administration of justice in courts of the United States is sufficiently and plainly indicated from the statement made and the failure on the part of the trial tribunal sitting in the District of Columbia to accept as binding authority the opposite pronouncements of this Court of final appeal in matters of Federal cognizance sitting in all these United States."

In the present case it is suggested that the Circuit Court of Appeals, in totally ignoring the main question raised in this brief, departed from the underlying principle in *New York Central Railroad Co.* v. *Johnson,* 279 U. S. 310, where

Mr. Justice Stone, speaking for the Court, said in regard to the reference to petitioner as "an eastern railroad":

> "Such remarks of counsel and others of a similar character, all tending to create an atmosphere of hostility toward the petitioner as a railroad corporation located in another section of the country, have been so often condemned as an appeal to local and sectional prejudice as to require no comment."

The purport of what is quoted is that remarks by counsel tending to create an atmosphere of hostility are grounds for reversal and must be avoided. In its decision the Circuit Court of Appeals utterly ignored this principle.[4]

Incidentally, evidence of the presence of the dictaphone in petitioner's room was proper and the irritation shown by the judge who fined Mr. Meacham in connection with that incident was unjustifiable. In the Bridges case, in which the writer acted as senior counsel for the Government, counsel for the alien sought to reopen the case and present evidence that the alien's telephone had been tapped. Judge Sears properly refused to reopen the case because the supposed wire tapping occurred between August 5th and August 22nd, while the hearing had been concluded June 12th. It was not suggested that the same action would have been taken had the wire tapping occurred during the hearing. Here an attempt to present evidence connected with the presence of a dictaphone seems to have been proper and

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[4] The comment on the presence of Washington Attorneys comes within this condemnation and although it was brought to the attention of the Court of Appeals it was disregarded.

The District Attorney asked on cross-examination (p. 1567):

> "Q. As a matter of fact you did not have your defense until your Washington lawyers got down here and got ready to try this case did you?"

Obviously this implicit appeal to local and sectional prejudice comes within the condemnation of this court noted above.

the action of the judge would seem to indicate an angry hostility.

The writer has indicated that the main incident complained of in this brief should not be considered separate and apart from other actions of court and counsel and in this connection the action of the United States Attorney in denouncing the petitioner as one who had made early a million dollars in black marketing "at a time when this nation was in a splendid effort to avoid the catastrophe of wild inflation" was a clear attempt to arouse the prejudices and passions of the jury against the petitioner as an unpatriotic citizen and comes clearly within the actions complained of in an editorial in the Harvard Law Review of May 1920.[5]

In *United States* v. *Licht*, 158 F. (2d) at page 462 it is said that an improper reference to the war in progress can-

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[5] "LAWLESS ENFORCEMENT OF LAW.—During the past year no less than forty-four convictions were reversed by appellate tribunals in the United States for flagrant misconduct of the public prosecutor or of the trial judge whereby the accused was deprived of a fair trial. In thirty-three of these cases the district attorney made inflammatory appeals to prejudice upon matters not properly before the jury. * * * Appellate courts interfere reluctantly in these cases and set aside convictions only when convinced that the conduct of the district attorney was flagrant and highly prejudicial. Hence it is a fair inference that the evil is even more extensive than the face of the reports discloses. * * *"

In his address at the Centennial Celebration of Harvard Law School June 21, 1920 the Honorable Charles Evans Hughes said:

> "And in the conduct of trials before the courts we find a growing tendency on the part of prosecutors to resort to grossly unfair practices."

While the librarian of this Court states that this address was printed with that of Roscoe Pound under the title "Two Addresses Delivered before the Alumni of the Harvard Law School at Cambridge, June 21, 1920" and believes that there is a copy of this address in the Library of Congress, search there has been unavail-

not be cured by a judge's admonition to disregard it, citing many cases.

See also *August* v. *United States*, 257 Fed. 388.

SUMMARY.

While this brief is addressed to a single point, it seems proper here to summarize what has been said here regarding other related matters.

The Circuit Court, in disregarding the fact that the District Attorney characterized the Jewish petitioner as a greedy, grasping Shylock, acted in conflict with a decision in the Eighth Circuit.

In so doing it also acted on an important question of general law in conflict with all the known cases and in a way probably untenable.

It has disregarded the admonition of this Court to prevent prejudicial statements of counsel tending to create prejudice.

It has sustained the presiding judge in unjustly fining petitioner's counsel for contempt in circumstances which made it evident that that action would, in regular course, come to the knowledge of the jurors.

It has sustained the exclusion of competent and relevant evidence contrary to the uniform decisions in other jurisdictions and has thus decided an important question relating to the law of evidence in a way probably untenable and certainly contrary to the decisions of all courts wherever the question has arisen. (Pet. pp. 38-42)

It sustained the trial court in permitting the District Attorney to bring prejudice and passion into the case by denouncing petitioner as one acting illegally, selfishly and greedily during the war while others were making great

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ing up to this writing. The quotation is, therefore, copied from "The Case of Sacco and Vanzetti" by Felix Frankfurter, page 63, and in certain respects the situation in that case is analogous to the situation in the case at bar.

sacrifices to secure its successful termination, all of which has been uniformly condemned.

There are other compelling reasons for a review set out in the petition, but what is noted in this summary seems sufficient to justify the Court in granting the writ.

Years ago the writer chanced to hear an Easter sermon in which the learned divine pointed out that the words "Justice and Righteousness" were translations of a single Greek word and that Justice and Righteousness were, in reality, one and the same thing.

It may be noted that Macedonius, bishop of Constantinople, was deprived of his office by the Council of Constantinople in the year 360 as "he openly professed that the Holy Spirit is a divine energy diffused throughout the universe and not a person. * * *" It is respectfully suggested that it is the function of this Court to see that the divine energy of righteousness is diffused not only throughout the circuit courts of appeal but in all judicial proceedings in all courts and, to use a phrase appearing in the petition in the Wan case, "sitting in all these United States."

Respectfully submitted,

CLARENCE N. GOODWIN,
Amicus Curiae.

The respondent consents to the filing of this brief.

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The consent of counsel for the petitioner to the filing of this brief is submitted herewith.